

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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FEDERAL DEPOSIT INSURANCE  
CORPORATION, as Receiver for  
FIRST NATIONAL BANK OF  
NEVADA, SUCCESSOR-IN-  
INTEREST TO FIRST NATIONAL  
BANK OF ARIZONA,

Plaintiff,

VS.

JASON HALPERN, SHAWN  
LAMPMAN, JOHN KNOTT, BRUCE  
K. ISAACSON, BRADLEY F.  
BURNS, LORI A. BURNS FAMILY  
TRUST u/a/d 4/15/1988, ORIGIN  
PROPERTIES, LLC, a Nevada limited  
liability company,

## Defendants.

2:08-CV-01571-PMP-GWF

Consolidated with:

Case No. 2:09-CV-02300-PMP-GWF

# **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

LAKE ELSINORE 521 LLC, a Nevada limited liability company,

Plaintiff.

vs.

FEDERAL DEPOSIT INSURANCE  
CORPORATION, as Receiver for  
FIRST NATIONAL BANK OF  
NEVADA, SUCCESSOR-IN-  
INTEREST TO FIRST NATIONAL  
BANK OF ARIZONA.

Defendant.

1        This is an action for a deficiency judgment following the foreclosure of  
2 commercial real property securing a commercial loan. The parties are familiar with  
3 the convoluted history of these consolidated cases, and in the Joint Pretrial Order  
4 (Doc. # 175) have stipulated to many of the underlying facts.

5        On January 5, 2009, Plaintiff, the Federal Deposit Insurance Corporation  
6 (“FDIC”) in its capacity as Receiver for First National Bank of Nevada, successor in  
7 interest to First National Bank of Arizona (collectively “the Bank”), filed a  
8 Supplemental Complaint (Doc. #29) against Defendants’ alleging a single claim for  
9 Deficiency Judgment in the sum of \$9,136,858.41, plus interest and attorneys fees,  
10 pursuant to NRS 40.455, and NRS 40.457.

11       The action was originally commenced February 14, 2008, by the filing of  
12 the Bank’s complaint for breach of contract against Defendant Guarantors in  
13 Nevada State District Court. On June 30, 2008, First National Bank of Arizona  
14 merged with First National Bank of Nevada, and First National Bank of Nevada  
15 became the successor in interest on the claim. On July 25, 2008, the Office of the  
16 Comptroller of the Currency declared the Bank insolvent and appointed the FDIC its  
17 Receiver. On August 21, 2008, the FDIC was substituted as the real party in interest  
18 and Plaintiff in this action. On November 13, 2008, Plaintiff FDIC removed the  
19 action from Nevada State Court, pursuant to 12 U.S.C. § 1819(b)(2)(B). This Court  
20 has jurisdiction under 12 U.S.C. § 1821 and 28 U.S.C. § 1331. Based upon the  
21 evidence adduced at the trial conducted October 16 - 18, 2012, and the facts  
22 stipulated in the Joint Pretrial Order, the Court hereby enters the following Findings  
23 of Fact and Conclusions of Law:

24       The task of the Court in determining whether a judgment creditor or  
25 beneficiary under a deed of trust is entitled to recover a deficiency judgment is a  
26 relatively straight forward one.

1       “NRS 49.455 allows a judgment creditor to seek a  
2 deficiency judgment where the proceeds he received  
3 from the sale of the security do not equal the amount  
4 of his debtor’s indebtedness. Judgment is limited,  
5 however, to the amount by which the debt exceeds  
6 the greater of the fair market value of the security on  
7 the date of the foreclosure sale or the amount bid at  
8 such sale by the creditor. NRS 40.459. *Unruh v.*  
9 *Streight*, 96 Nev. 684, 685, 615 P.2d 247, 248  
10 (1980).

11       The Parties to this case dispute the fair market value of the subject  
12 Property on the date of the foreclosure sale, May 16, 2008. Plaintiffs and  
13 Defendants respectively retained two expert appraisers, Jason Lund and Andrew  
14 Minstein, who testified extensively at trial. Predictably, the appraisers assigned  
15 different fair market values to the subject Property as of May 16, 2008, and their  
16 differences were preordained by the fact that they employed distinct methods of  
17 calculating the fair market value. Plaintiffs’ appraisal expert, Lund, insists that the  
18 appraised fair market value of the Property should be determined based upon its  
19 condition “as is” on the date of foreclosure. Defendants’ expert, Minstein, opines  
20 that a “subdivision” method of appraisal should be employed to determine the fair  
market value of the Property “as if it were completed.” Although the disparate  
appraisals of Lund and Minstein provide relevant retrospective opinion evidence as  
to the value of the subject Property two years earlier, the Court is not confined to  
considering only the opinions of the experts tendered by the Parties.

21       “Fair market value is generally defined as the price  
22 which a purchaser, willing but not obliged to buy,  
23 would pay an owner willing but not obliged to sell,  
24 taking into consideration all of the uses to which the  
25 property is adapted and might in reason be applied.”  
(Citation omitted) . . . “The district court could  
consider all relevant evidence in determining the  
value of the property.” (Citations omitted) *Id.* at  
686.

26       Here, evidence adduced at trial concerning the value of the subject Property

1 during the relevant period June 2005 through May 2008, provides the Court with a  
2 sound basis for determining the fair market value.

3 In 2005, when Defendants discussed with FDIC's predecessor-in-interest,  
4 First National Bank of Arizona, a possible loan for the acquisition of the subject  
5 Property, the Property was tentatively mapped for a subdivision. Before making the  
6 loan, the Bank hired an appraiser to independently determine the value of the  
7 property that would secure the loan. That appraisal concluded that the property, "as  
8 if" developed in its entirety as planned, was valued at \$41,700.000.00 as of June 22,  
9 2005.

10 In March 2006, Defendants negotiated the purchase of the subject Property  
11 for \$20,490,000.00. On March 22, 2006, Defendant Lake Elsinore executed a  
12 Promissory Note in favor of First National Bank of Arizona in the principle amount  
13 of \$18,400,000.00, and a Business Loan Agreement. The Note was secured by a  
14 deed of trust on the subject Property in favor of the Bank. Pursuant to the Note,  
15 Lake Elsinore agreed to pay the Bank the outstanding principle balance of the Note  
16 and accrued interest on the maturity date of March 21, 2007. Also on March 22,  
17 2006, Guarantor Defendants Bradley Burns, Lori Burns, Jason Halpern, Bruce  
18 Isaacson, Bradley F. and Lori A. Burns Family Trust, Origin Properties, LLC, and  
19 KH Capital, LLC executed Commercial Guarantees by which each agreed to act at  
20 guarantors of Lake Elsinore's obligations under the Note and Business Loan  
21 Agreement. Over the next year, the Bank incrementally dispersed \$17,728,429.17  
22 of the principle amount of the loan to Lake Elsinore pursuant to the terms of the loan  
23 documents. On March 13, 2007, the Note's maturity date was extended by  
24 agreement of all parties to September 17, 2007.

25 Defendant Bradley Burns, the Guarantor Defendant chiefly responsible for  
26 overseeing the development of the subject Property, testified that when Defendants

1 acquired the Property in question it was subject to the Tentative Tract Map issued by  
2 the City of Lake Elsinore approving a subdivision which included among other  
3 things, streets and 521 residential lots. The Tentative Tract Map also set forth 103  
4 requirements which had to be met before the City of Lake Elsinore would issue a  
5 Final Tract Map and a certificate called a Community Facility District, or CFD. The  
6 CFD was particularly important, according to Burns, because once issued by the  
7 City of Lake Elsinore, it assured the Defendant Developers and Guarantors that they  
8 would receive reimbursement from the City of Lake Elsinore of approximately  
9 \$40,000 - \$50,000 per lot upon completion. Burns testified that from the time  
10 Defendants came into possession of the subject Property in March, 2006 through  
11 September 17, 2007, Defendants worked actively to satisfy the 103 conditions set  
12 forth in the Tentative Tract Map. The uncontested testimony of Burns  
13 establishes that as of September 17, 2007, approximately six months of work  
14 remained to be completed to satisfy the conditions for the Final Tract Map and CFD  
15 from the City of Lake Elsinore. Burns further testified that the Bank refused to  
16 release the remaining \$671,000,000 of loan funds to Defendants necessary to enable  
17 Defendants to complete the remaining work necessary to satisfy the Tentative Tract  
18 Map requirements which would have led to the approval of the CFD valued at  
19 approximately \$20,000,000 worth of reimbursements.

20 The trial record shows the Bank obtained two separate appraisals of the  
21 subject Property while Defendants were working to satisfy the requirements of the  
22 Tentative Tract Map. Both appraisals were conducted by Daniel Huber, an appraiser  
23 with Commercial Asset Valuation in California. The first appraisal prepared by  
24 Huber, dated September 26, 2007, provides an appraisal of the Property as of August  
25 21, 2007, consisting of three parts. That appraisal assigned a fair market value of  
26 the subject Property “As Is” (assuming vacant land with a Tentative Tract Map for

1 521 residential lots) at \$18,700,000. Huber assigned an identical fair market value  
2 of \$18,700,000 to the subject Property in a condition “As Is”/“As If Complete”,  
3 assuming Final Tract Map approval for 521 lots, but no CFD approval. Finally,  
4 Huber assigned an appraised value of \$33,450,000 to the subject Property “As If  
5 Complete”, assuming Final Tract Map and CFD approval for 521 lots/infrastructure.  
6 Huber’s appraisal as of August 21, 2007, therefore, shows a decreased appraised fair  
7 market value of the subject Property compared to that reflected in the appraised  
8 value of the Property “As If Complete” of \$41,700,000 as of June 22, 2005.

9 The Bank secured a second appraisal of the property by Daniel Huber as  
10 of April 17, 2008, approximately one month before the foreclosure sale on May 16,  
11 2008. William Asher, Real Estate Division Manager at the Bank explained that this  
12 appraisal was secured by the Bank to enable the Bank to assess the fair market value  
13 of the subject Property for purposes of the May 16, 2008 foreclosure sale. Huber’s  
14 second appraisal, reflected in his report of April 21, 2008, again contained fair  
15 market values of the subject Property based upon variable conditions. First, Huber  
16 estimated an appraised value of \$12,100,000 for the subject Property “As Is”,  
17 assuming no Final Tract Map approval or CFD. Second, assuming Final Tract Map  
18 approval, but no CFD, Huber estimated the value of the subject Property at  
19 \$13,100,000. Finally, Huber estimated an appraised value of the subject Property at  
20 \$20,300,000, “As If Complete,” assuming Final Tract Map and CFD approval.

21 Notwithstanding the appraisal estimate of Plaintiffs’ expert Jason Lund  
22 conducted two years later which estimated the “As Is” value of the Property at  
23 \$8,400,000 on May 16, 2008, FDIC has stipulated that it will adhere to the “As Is”  
24 appraisal of \$12,100,000 provided by the Huber appraisal conducted in April 2008.  
25 The FDIC stipulation is consistent with the testimony of Robert Schwarzlose,  
26 Manager of the Receivership Division of FDIC, who testified that once a loan is

1 defaulted and a foreclosure sale occurs, it is not the policy of the FDIC to obtain  
2 subsequent appraisals of the Property which increase the amount of deficiency.

3 Confronted with the array of appraised fair market values provided by  
4 appraisers Daniel Huber, Jason Lund, and Andrew Minstein, the Court must decide  
5 which method of appraisal is appropriate, and thereafter which appraised value is  
6 supported by a preponderance of the evidence. In this regard, the Court is persuaded  
7 by the testimony of Andrew Minstein that the appraised value of the subject  
8 Property as of May 16, 2008 should be made “As If Complete” assuming Final Tract  
9 Map and CFD approval.

10 The Court’s conclusion in this regard is consistent with the testimony of  
11 William Asher, Real Estate Manager at the Bank, who testified that all values  
12 assigned by Daniel Huber were considered by the Bank in making decisions  
13 regarding the loan extended to Defendants. This conclusion is also supported by the  
14 Nevada Supreme Court’s Declaration in Unruh that fair market value is determined  
15 by “the price which a purchaser, willing but not obliged to buy, would pay an owner,  
16 willing but not obliged to sell, taking into consideration all the uses to which the  
17 property is adapted and might in reason be applied.” Id. at 249. There is no  
18 evidence that the subject Property was adapted to any reasonable use other than as a  
19 subdivision as reflected in the Tentative Tract Map issued by the City of Lake  
20 Elsinore. This supports Andrew Minstein’s utilization of a “subdivision  
21 development analysis” by which two years after the foreclosure sale, he arrived at  
22 an “As If Complete” appraised value for the subject Property of \$22,370,000. Whether  
23 the Court accepts the “As If Completed” appraised value assigned by Andrew  
24 Minstein, or the April 2008 “As If Complete” appraisal by Daniel Huber, the result  
25 in this case is the same. The Court concludes that the appraised value of  
26 \$20,300,000 estimated by Daniel Huber as of April 17, 2008 is the most reasonable

1 appraised value of the subject Property supported by a preponderance of the  
2 evidence adduced in this case. The Court therefore finds there is no deficiency and  
3 that judgment should be entered in favor of Defendants and against Plaintiff FDIC  
4 on its claim for deficiency judgement.

5 **IT IS SO ORDERED.**

6 Dated this 24<sup>th</sup> day of October, 2012.

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10 PHILIP M. PRO  
United States District Judge

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